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## Western Environmental Law Center

November 25, 2015

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**Re: Revised Environmental Assessment (EA) for Navajo Mine Area IV North  
Permit Revision Application**

Dear Mr. Yellowman:

Thank you for the opportunity to submit comments on the Revised Environmental Assessment (EA) for the proposed Navajo Mine Area IV North Mine Plan released by the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement (OSMRE) on October 15, 2015.

These comments are submitted by Western Environmental Law Center on behalf of San Juan Citizens Alliance (SJCA), Diné Citizens Against Ruining our Environment (Diné CARE), Sierra Club, Center for Biological Diversity (Center), and Amigos Bravos (collectively, "Citizens Groups").

### **Citizens Groups**

SJCA is a non-profit organization, with over 500 members in the Four Corners region, actively involved in energy development oversight; advocating for cleaner air quality and better stewardship of our natural systems; promoting reduced energy consumption, energy efficiency and renewable energy; and working for improvements to community health. SJCA members in the Four Corners region live in areas of existing high-density energy development and infrastructure. Our members are adversely affected by mining operations at the Navajo Mine, including this expansion project, as well as from impacts at the Four Corners Power Plant ("FCPP").

Diné CARE is an all-Navajo organization comprised of a federation of grassroots community activists in Arizona, New Mexico and Utah who strive to educate and advocate for our traditional teachings derived from our Diné Fundamental Laws. Diné CARE's goal is to

protect all life in our ancestral homeland by empowering local and traditional people to organize, speak out, and determine the outlook of the environment through civic involvement and engagement in decision-making process relating to tribal development.

The Center is a non-profit 501(c)(3) corporation with offices in Arizona, New Mexico, California, Nevada, Oregon, Washington, Alaska, Illinois, Minnesota, Vermont, and Washington, D.C. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center has 320,000 members and online activists throughout the United States, Colorado, New Mexico and the world. The Center is actively involved in species and habitat protection issues worldwide, including throughout the western United States. The Center, its members, and staff members use the lands in and near the BHP Navajo Mine, and in particular the Chaco and San Juan River, for recreational, scientific, and aesthetic purposes. They also derive recreational, scientific, and aesthetic benefits from these lands through wildlife observation, study, and photography. The Center and its members have an interest in preserving their ability to enjoy such activities in the future. As such, the Center and its members have an interest in helping to ensure their continued use and enjoyment of these activities on these lands. The Center is particularly concerned about species and critical habitats that are affected by coal mining at the BHP Navajo Mine.

Sierra Club has more than 1.4 million members and supporters who work for a safe and healthy community in which to live, smart energy solutions to combat global warming and an enduring legacy for America's wild places. Since 1892, the Sierra Club has been working to protect communities, wild places, and the planet itself. Sierra Club is the oldest, largest, and most influential grassroots environmental organization in the United States. In New Mexico, Sierra Club has over 7000 members. It has been a priority of the Sierra Club nationally and locally to stop irresponsible coal mining, curb global warming and ensure clean air and clean water for all.

Amigos Bravos is a nonprofit river conservation organization whose mission is to preserve the ecological and cultural integrity of New Mexico's rivers and watersheds by holding polluters and governments accountable for their actions. Through this work, Amigos Bravos ensures that New Mexico's rivers and watersheds provide clean water for irrigating, swimming, fishing, and boating. Amigos Bravos' effort is inspired by New Mexico's traditional water users and guided by the vision of water as both a cultural and natural resources. Amigos Bravos has members throughout New Mexico that use and enjoy the water resources of New Mexico for irrigation, livestock watering, fishing, recreation, spiritual pursuits, and aesthetic interests. Amigos Bravos is increasingly concerned that the observed and anticipated impacts of global warming and climate change will compromise its interests and the interests of its members.

### **1. The Revised EA fails to comply with the National Environmental Policy Act**

The Revised EA includes a section on the Procedural History (1.1) of the project discussing the initial EA in 2005 that evaluated an expansion of 3,800 acres. The Procedural History

Section of the Revised EA accurately discloses that the 2005 EA for Navajo Expansion (NM-003-F-R-01) was remanded,

On June 13, 2007, Diné Citizens Against Ruining our Environment (Diné CARE) and San Juan Citizens Alliance challenged OSMRE's approval in the United States (U.S.) District Court of Colorado in *Diné C.A.R.E. v. Klein* (Civil Action No. 07-cv-1475-JLK). On October 28, 2010, the Colorado District Court issued a decision vacating OSMRE's approval of the mine plan and remanded the matter back to OSMRE. (Revised EA 2015, Page 1)

In response, on December 1, 2011 OSMRE released BHP-Billiton Navajo Coal Company (BNCC) pre-2016 Mine Plan for Area III and Area IV North EA #NM-0003-F-Y-01) altering the proposed action for Navajo Mine expansion to 714 acres. Citizens Groups responded with comments on January 17, 2012. On April 16, 2015, the District Court vacated the EA/Finding of No Significant Impact (FONSI) and the 2011 Area IV North Surface Mining Control and Reclamation Act (SMCRA) permit. Central to the court's decision to vacate is the relationship to Navajo Mine to combustion related impacts at Four Corners Power Plant (Navajo Mine is the sole provider of coal to Four Corners Power Plant; Four Corners Power Plant burns only Navajo Mine coal.) Between 2011 and 2015, BNCC disturbed the land in Area IV North with mining and road/ancillary equipment work.

OSMRE prepared an Environmental Impact Statement for the Four Corners Power Plant and Navajo Mine Energy Project (FCPP/NMEP EIS) published May 1, 2015 on behalf of Navajo Transitional Energy Company (NTEC) who has purchased the mine from BHP/Billiton. Citizens Groups provide substantive comments to OSMRE on the Draft EIS on June 27, 2014 noting significant impacts that would result in running FCPP and Navajo Mine through 2041. In addition, the OSMRE renaming of portions of Navajo Mine to Pinabete Mine obfuscated the permitting actions analyzed as part of the FCPP/NMEP EIS. The Record of Decision for the FCPP/NMEP EIS in July of 2015 noted the decision does not apply to Area IV North (830 acres) and "does not authorize NTEC to re-initiate mining or mining-related disturbance in that area."<sup>1</sup>

On October 15, 2015 OSMRE released the revised EA for the proposed Navajo Mine Area IV North Mine Plan and claims to, "incorporate by reference relevant sections of the EIS, as noted in specific EA sections." (revised EA 2015, Page 1.) OSMRE states:

This EA has been prepared to extend the analyses in the 2012 EA by tiering to the analysis presented in the FCPP/NMEP EIS, published on May 1, 2015. The FCPP/NMEP EIS is incorporated by reference in to (sic) this EA (specific sections, data,

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<sup>1</sup> United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement, Record of Decision, Four Corners Power and Navajo Mine Energy Project, July 2015, page 13.

and conclusions that are incorporated are noted within the individual resource sections in Chapters 3, 4 and 5), and is publically-available (sic) on OSMRE's website or by request to OSMRE. This EA adds analysis not included in the 2012 EA to address the reasonably foreseeable combustion-related effects of NTECs proposed expansion of operations at the Navajo Mine. This EA therefore addresses both mining and the effects of the coal combusted at the FCPP associated with Area IV North Coal. Emissions associated with Area IV North coal occurring prior to July 2016 are directly analyzed in this EA, while any remaining coal from Area IV North that would be combusted after July 2016 is evaluated in the FCPP/NMEP EIS and incorporated by reference in this EA. (Revised EA 2015, Page 2).

OSMRE also readily admits the Proposed action of the series of EAs on Navajo Mine has now changed to account for the fact that there is no longer a 2016 deadline on using the Area IV coal due to the closure of Units 1-3 at FCPP. In fact, the Revised EA states,

Consequently, the volume of coal to be mined in Area IV North under this Proposed Action was evaluated in the 2012 EA because with the operation of Units 1-5, that volume would have been combusted by 2016; the same mining related effects are also analyzed in this EA. However, with the reduction in combustion rate, that volume of coal will now be used beyond July 6, 2016. Based on the current mine plan, it is estimated that it will require approximately 4 years to complete coal recovery in Area IV North (which would be conducted concurrent with mining activities in the Pinabete area beginning in 2016)... (underlined for emphasis) (revised EA 2015 , Page 4).

Therefore, OSMRE has now arbitrarily and capriciously extended the analysis purported to be the Proposed Action the Revised EA from a time frame to 2019-2020.

Of primary concern to Citizens Groups is OSMRE's attempt to incorporate by reference the FCPP/NMEP EIS into the Revised EA for the proposed Navajo Mine Area IV North Mine Plan. Citizens Groups formally incorporate by reference our comments and exhibits submitted to OSMRE on June 27, 2014 applicable to the Revised EA for the proposed Navajo Mine Area IV North Mine Plan. Citizens Groups also formally incorporate by reference comments on the pre-2016 Mine Plan for Area III and Area IV North EA #NM-0003-F-Y-01) submitted on January 17, 2012. Please confirm that these Citizen Group comments are incorporated by reference and included in the Administrative Record for this Revised EA 2015. The OSMRE desire to incorporate by reference the FCPP/NMEP EIS into the Revised EA for the proposed Navajo Mine Area IV North Mine Plan incorrectly attempts to tier the EA into EIS level analysis.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370h, is an "action forcing" statute that require federal agencies to take a "hard look" at the environmental consequences of its actions. *Utah Envtl. Congress v. Bosworth*, 439 F.3d 1184, 1195 (10th Cir. 2006); 40 C.F.R. § 1500.1(a). In required environmental analysis under NEPA, "[a]n agency

may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998). Additionally, agencies must "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. 1502.14(c).

By attempting to circumvent significant impacts by incorporating by reference the FCPP/NMEP EIS into the Revised EA for the proposed Navajo Mine Area IV North Mine Plan, OSMRE shirks their responsibility where significant impacts warrant an EIS for the Navajo Mine Plan, due to the myriad of significant impacts raised by burning mined coal from Area IV through 2019-2020 (see Proposed Action). OSMRE continues to segment the Navajo Mine Area IV North impacts from legitimate analysis and limits the analysis of climate changes impacts in the Revised EA for the proposed Navajo Mine Area IV North Mine Plan to 2016, although the Proposed Action is now to allow Navajo Mine Area IV mining through 2019-2020. (see Revised EA 2015, page 342) This appears to be a mistake of OSMRE cutting and pasting from the earlier 2012 EA on Navajo Mine Area IV North. In addition, Chapter 4 of the Revised EA for the proposed Navajo Mine Area IV North Mine Plan talks extensively about Area III of Navajo Mine—this should not even be included in this revised EA.

Agencies must consider connected actions together. *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1182-83 (10th Cir. 2002); *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985); 40 C.F.R. § 1508.25(a). Agencies may not "divid[e] a project into multiple 'actions,' each of which individually has a insignificant environmental impact, but which collectively have a substantial impact." *Id.* The test for determining connected actions is "whether each of two projects would have taken place with or without the other and thus had independent utility." *Wetlands Action Network v. U.S. Army Corps of Eng'rs.*, 222 F.3d 1105 (9th Cir. 2005); *Conservation Soc'y of S. Vt. v. Sec. of Transp.*, 531 F.2d 637, 640 (2d Cir. 1976). Under NEPA regulations, actions are considered connected if they "[c]annot or will not proceed unless other actions are taken previously or simultaneously" or if they "[a]re independent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. §§ 1508.25(a)(1)(ii)-(iii). Relevant factors for determining whether actions are connected include, whether the segment (1) "has logical termini"; (2) "has substantial independent utility"; (3) "does not foreclose the opportunity to consider alternatives"; and (4) "does not irretrievably commit federal funds for closely related projects." *Utahns for Better Transp.*, 305 F.3d at 1183.

Additionally, agencies must consider "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(b). As explained by the Supreme Court, "when several proposals ... that will have cumulative or synergistic impact upon a region are pending concurrently before an agency their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency

evaluate different courses of action.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002) (stating that an “agency’s EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum”).

OSM cannot proceed on the basis of this revised EA (which has significantly altered the project timeline from a 2016 deadline to 2019-2020) and must, instead, complete a comprehensive EIS to account for myriad connected and cumulative actions, including the mine’s power plant, FCPP. FCPP is the mine’s sole customer, receives all of its fuel from the mine, and is simultaneously proceeding down a parallel track to secure approval from the Federal Bureau of Indian Affairs to renew its lease (which currently ends in 2016) through 2041. The statement of purpose and need should therefore be revised to account for the entire mine-power plant complex, the Department of the Interior’s full range of responsibilities pertaining to that complex (i.e., not just those of OSM, but also those of BIA) as well as the broader landscape that it is situated within and the broader communities that inhabit, value, and rely on this landscape. Revision of the purpose and need statement to include connected actions, requires OSM to revise its alternatives analysis. Since the purpose of the over-all mine-power plant project is generation of energy, OSM must consider other primary alternatives for energy production, such as replacing FCPP with renewable energy sources or gas. *See New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009). All reasonable foreseeable past, present and future impacts must be analyzed. OSMRE has not done that in the revised 2015 EA.

Consideration of cumulative actions within a single NEPA process is, notably, a different obligation from the agencies separate and independent duty to consider cumulative impacts. *Compare* 40 C.F.R. § 1508.7 (cumulative impacts) *with id.* § 1508.25(b) (requiring consideration of “cumulative actions” in single NEPA analysis). An agency’s duty to address cumulative actions in a single NEPA process is also different from an agency’s duty to consider connected actions: “there may be circumstances in which proposals that are not functionally or economically interdependent may, because of cumulative impacts, trigger the requirement to prepare a comprehensive EIS.” *Friotiofson v. Alexander*, 772 F.2d 1225, 1241 n. 10 (5th Cir. 1985) *rev’d on other grounds*, *Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669 (5<sup>th</sup> Cir. 1992) (explaining difference between agency duty to consider “cumulative impacts,” agency duty to complete comprehensive NEPA analysis for “cumulative actions,” and agency duty to complete comprehensive NEPA analysis for “connected actions”). Thus, even if the EA’s cumulative impacts analysis somehow passes muster (though it does not), and even if the mine expansion project is found to be not connected to the FCPP (though it is), this does not obviate OSM’s—and, more broadly, Interior’s—obligation to prepare a comprehensive NEPA analysis to address cumulative actions.

All the mining at Navajo Mine (Areas I through V) is connected and must be evaluated together as connected and cumulative actions. *Id.* §§ 1501.5(a), (b). Since the Navajo Nation leased 24,000 acres for the Navajo Mine over half a century ago in 1957, the mine has

successfully “evaded meaningful environmental review.” *Diné C.A.R.E. v. Klein*, 747 F. Supp. 2d 1234, 1240 (D. Colo. 2010). Aside from three EISs that indirectly referenced portions of the mine, the mine’s expansion has only been evaluated in a series of EAs for individual segments of the mine. Counting the present proposed extension, since 1991, expansion of the mine has been segmented into parcels of 829, 508, 708, 106, and now 830 acres, each subject only to evaluation in an EA. None of these expansions would have been economically viable if isolated from the other segments of the mine. Moreover, none of these segments in isolation could justify the infrastructure required to mine it (draglines, railroad to FCPP, and associate infrastructure), to burn it at FCPP (the power plant), or to transport the electricity to load centers in four states (transmission lines). Thus each section is an “independent part[] of a larger action and depend[s] on the larger action for [its] justification.” 40 C.F.R. § 1508.25(a)(1)(iii). Additionally, the EA admits that extension of the mine to the 10,000 acres that comprise Area IV North and Area IV South is “reasonably foreseeable.” EA at 204, 207. The EA also concedes that Area V is expected to be mined as well. EA at 205. Finally, the mining expansion contemplated in Area IV North, as well as the other mining activities, are cumulative actions. § 1508.25(b). Thus, the mining of all segments of the Navajo Mine, including Area IV North, as well as Area IV South and Area V, are connected and cumulative actions that must be evaluated together. *Id.* §§ 1501.5(a), (b). OSM readily admits that coal blending is necessary from distinct areas at Navajo Mine to meet BTU requirements in burning coal at FCPP.

OSM’s failure to prepare a single EIS for Area IV North, along with FCPP and the other areas of the Navajo Mine, is improper segmentation of a project to avoid preparation of a rigorous EIS. Indeed, the agency’s unexplained decision to reduce the expansion from over 3,000 acres to approximately 800 evades the requirement in the Department of the Interior’s NEPA manual that normally requires an EIS for mining proposals of more than 1,280 acres. DOI Departmental Manual 13.4(A)(4)(b); *see also Diné C.A.R.E.*, 747 F. Supp. 2d at 1251-53 (holding that OSM had failed to show why an EIS was not required for the proposed expansion into Area IV North based on the standard provided by its own manual). If these segments are not subjected to one comprehensive EIS, then 33,000 acres of coal could be strip-mined and burned over a period of nearly a century without ever undergoing “meaningful environmental review”—an incredible divergence from DOI’s rule that strip mines greater than 1,250 acres that occur over 15 years “normally require the preparation of an EIS.” DOI Departmental Manual 13.4(A)(4). One significant problem that arises from OSM’s segmentation of operation into individual, discrete mine expansions is that it never considers the inevitable shutdown of the mine and power plant. There is no question that the project cannot continue indefinitely. The eventual closure of the operation will cause significant impacts, including a legacy of pollution and uncertain responsibility for clean up, now conceptually NTEC’s problem with BHP’s departure. By failing to consider these inevitable aspects of the operation, OSM evaluates only the benefits of the mining “boom” and not the inevitable “bust.” This is contrary to the “rule of reason” and results in a skewed environmental analysis. *See Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir.) (agency cannot consider only benefits of action, but must also consider costs).

Council on Environmental Quality guidance on NEPA (40 C.F.R. § 1502.21) pertains to Incorporation by Reference and states,

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

This legal citation confirms the onus for OSMRE to insure that public review is not impeded by the agency's NEPA action. Here, OSMRE's attempt to incorporate by reference the Navajo Mine EA into the FCPP/NTEP EIS project is unsupported by agency actions below.

## **2. The Revised EA fails to fulfill public involvement requirements**

OSMRE has limited public involvement on the Revised EA for Navajo Mine Area IV North Permit Revision Application to those with internet accessibility. OSMRE posted the EA on their website on October 15, 2015 and made no effort to place hard copies in impacted communities. As OSMRE is well aware, many citizens who may want to know what is occurring at Navajo Mine simply have no electricity or computers with which to be informed on OSMRE's actions. This is particularly egregious for OSMRE due to the controversy over this project and previous OSMRE failure to adequately provide meaningful public participation for the Navajo Mine Area IV NEPA undertakings. No public hearing have been conducted for the Revised EA for Navajo Mine Area IV North Permit Revision Application and OSMRE points back to the 2012 EA as having complied with public participation requirements. OSMRE made no effort to provide Navajo speaking citizens with any way to understand the content of the EA.

In addition, and more concerning, is that OSMRE made no attempt to provide the FCPP/NMEP EIS on their website for Area IV North as a document incorporated by reference. OSMRE throws the FCPP/NMEP EIS into the Area IV North EA and essentially tells the public to "trust us, there is no significance." This is woefully and legally inadequate.

## **3. The Revised EA attempts to use a Finding of No New Significant Impact (FONNSI).**

Due to OSMRE's attempt to tier the Revised EA for Navajo Mine Area IV North Permit Revision Application to the FCPP/NMEP EIS, OSMRE is trying to utilize a Finding of No New Significant Impact (FONNSI). This would need to be consistent with 40 C.F.R. § 1508.28. Citizens Groups disagree that there is no significant impact and request that OSMRE provide evidence that any Finding of No Significant Impact (FONSI) is legally in place for Navajo Mine Area IV expansion. OSMRE cannot legally finalize a FONNSI for Revised EA for Navajo Mine



Area IV North Permit Revision Application, in essence claiming that there is no new significant impact since the last EA. Since the Revised EA for Navajo Mine Area IV North Permit Revision Application now admits that the project timeline is through 2019-2020, the claim that there is no new significant impact is unbelievable given the known significant impacts associated with the comprehensive FCPP/Navajo Mine over the past 50 years, including but not limited to mercury and greenhouse gas impacts.

#### **4. The Revised EA Ignores Significant Impacts, Which Warrant Preparation of an EIS.**

Perhaps the biggest problem facing humanity is climate change. The Revised EA for Navajo Mine Area IV North Permit Revision Application perpetuates the notion that methane from Navajo Mine and associated impacts from burning coal at FCPP does not present a significant impact. The FCPP/NMEP EIS discloses that 258 million metric tons of carbon dioxide equivalent emissions would result from FCPP and Navajo Mine operating through 2041.<sup>2</sup> This is followed by the conclusion by OSMRE that the Proposed Action of coal mining and burning at FCPP/Navajo Mine through 2041 would be result in minor short- and long-term impacts to climate change.<sup>3</sup>

The Secretary of the Interior has also issued an order compelling OSM “to consider and analyze potential climate change impacts. . . when making major decisions regarding potential use of resources under the Department’s purview.” Sec. Or. 3289 § 3(a) (Sept. 14, 2009). Given this order, as well as the urgent need to reduce greenhouse gas pollution, OSM must consciously account for climate change and evaluate climate change/fossil fuel emissions in the Revised EA for Navajo Mine Area IV North Permit Revision Application.

The 2014 identification of the Four Corners Region as the “methane hotspot” of the United States is neglected by OSMRE’s Revised EA for Navajo Mine Area IV North Permit Revision Application. The “methane hotspot “ was detected by scientists from the University of Michigan, NASA’s Jet Propulsion Laboratory, Los Alamos National Laboratory and California Institute of Technology using space based observations and earth-based measurements to evaluate the 2003-2009 timeframe.<sup>4</sup> The authors conclude: “The persistence of this CH<sub>4</sub> signal from 2003 onward indicates that this source is likely from established gas, coal and coalbed

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<sup>2</sup> Department of the Interior, Office of Surface Mining Reclamation and Enforcement, Final Environmental Impact Statement, Four Corners Power and Navajo Mine Energy Project, May 2015, page 4.2-21.

<sup>3</sup> *Id.*, page 4-2-27.

<sup>4</sup> Eric Kort et al., Four Corners: The largest US methane anomaly viewed from space, *Geophysical Research Letters* (2014)

methane mining and processing.”<sup>5</sup> OSMRE must evaluate methane emissions from Navajo Mine Area IV to all methane emissions within the entire Navajo Mine, connect to FCPP CO<sub>2</sub> emissions and then evaluate all reasonably foreseeable development in the region, including oil and gas activity. OSMRE has failed to conduct this analysis to date.

“The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” *Ctr. for Biological Diversity v. Nat’l Highway Transp. Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). Indeed, for over a decade CEQ has directed agencies to consider cumulative impacts that contribute to climate change. CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 7, 24 (noting that “the importance of . . . climate change and other cumulative effects problems has resulted in many efforts to undertake and improve the analysis of cumulative effects” and that in evaluating cumulative impacts agencies should address “[r]egional and global atmospheric alterations from cumulative additions of pollutants that contribute to global warming”).

As a rule of thumb, an agency should consider a project’s GHG emissions if they exceed 25,000 metric tons CO<sub>2</sub>e. *Id.* at 3. An agency should consider “direct and indirect GHG emissions,” and where they are significant (i.e., greater than 25,000 tons CO<sub>2</sub>e), they should be “quantified and disclosed.” *Id.* at 5; 40 C.F.R. §§ 1508.25(c)(1)-(3). “Analysis of emissions sources should take account of all phases and elements of the proposed action over its expected life . . . .” CEQ, *Draft Guidance* at 5. When direct and indirect GHG emissions exceed the relevant threshold (again, 25,000 tons CO<sub>2</sub>e), the agency should also consider “mitigation measures and reasonable alternatives to reduce action-related GHG emissions.” *Id.* When addressing the “cumulative effects of GHG emission related to a proposed action,” an agency should “focus on an assessment of annual and cumulative emissions of the proposed action and the difference in emissions associated with alternative actions.” *Id.* In addition to quantifying GHG emissions, the EA must “discuss the *actual* environmental effects resulting from [the proposed action’s] emissions.” *Ctr. for Biological Diversity*, 538 F.3d at 1216.

Here, the EA fails entirely to consider the indirect and cumulative effects of the GHG emissions that would result from burning the million tons of coal that they plan to mine from Area IV North through 2019-2020, as well as from the historic mining and combustion of coal since that coal has been produced from the mine, in 1963. EA at 12, 215. The EA also does not account for the GHG emissions from other past, present, and reasonably foreseeable fossil fuel production and combustion sources in the region, including the San Juan Generating Station, San Juan Mine, and the thousands of oil and gas wells that have turned the San Juan Basin into a fossil fuel sacrifice zone. The EA concludes, “Future operation of FCPP and Navajo Mine Area IV North would emit GHGs; and therefore, contribute incrementally to climate change; however,

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<sup>5</sup> *Id.*

these emissions would continue to comprise a negligible (underlined for emphasis) – less than 1% of the U.S. GHG inventory and the national electric power sector and about 12 percent of the regional GHG emissions from electric power generation.” (Revised EA 2015, page 344). This is a particularly shocking conclusion by OSMRE denying the climate change impacts of FCPP/Navajo Mine. Courts have been clear that an agency may not minimize the impacts of an action by placing in such a broad context that impacts are masked. *Pac. Coast Fed’n of Fishermen’s Assn’s v. NMFS*, 265 F.3d 1028, 1036-37 (9th Cir. 2001).

Moreover, even the calculations of GHG emissions that the EA does provide understate the magnitude of emissions—and thus warming impacts—because the EA uses an outdated GWP of 21 for methane rather than the most recent science, which provides that methane has a GWP of 25 using a 100-year time period and a GWP of 105 using a 20-year time period. *See supra* Part 3.

The EA fails to quantify the past, present, and reasonably foreseeable GHG emissions from combustion of the mine’s coal at FCPP, which has occurred since 1963. This failure is particularly egregious since provision of coal from Navajo Mine to FCPP is the purported basis of the expansion’s purpose and need. EA at 11-14; *cf. N. Plains Resource Council v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011) (holding it was arbitrary and capricious for agency to fail to consider cumulative impacts from coal mine that was financial justification of proposed railroad); *see also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 537, 549-50 (8th Cir. 2003) (holding that the agency failed to take requisite hard look by not considering indirect effect of increased air pollution that would result from railroad line which would increase availability of coal while decreasing cost); *Ctr. for Biological Diversity v. Dept. of Interior*, 623 F.3d 633, 646 (9th Cir. 2010) (agency must not “avert[] its eyes from what is in plain view before it”). Like the EA vacated by the Ninth Circuit in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the EA here fails entirely to discuss the “*actual* environmental effects” that will result from FCPP’s GHG emissions. 538 F.3d at 1216. This is problematic because, as mentioned above, the EA fails to carry through on real consideration of mitigation measures or reasonable alternatives that would reduce foreseeable GHG emissions.

Regarding the mine’s past and reasonably foreseeable GHG emissions, the mine has been producing coal since 1963, producing vast quantities of GHGs, in particular methane, that, as noted above, is an extremely potent GHG. The mine also reasonably foresees continued operations through Areas IV North, IV South, and V. 2012 EA at 204 (“Reasonably foreseeable actions . . . are expected to include mining . . . the remainder of Area IV North and Area IV South.”), 205 (noting that Area V could be mined), 207 (Areas IV North and South comprise over 10,000 acres). And FCPP expects to continue to operate—and thus burn the mine’s coal—for “at least” 20 more years. Source Specific Federal Implementation Plan for Implementing Best Available Retrofit Technology for Four Corners Power Plant: Navajo Nation, 75 Fed. Reg. 64,221, 64,228 (Oct. 19, 2010). However, none of the GHG emissions from these past and

reasonably foreseeable mining operations are addressed by the EA.

Given the projected cross-media impacts of climate change—which unquestionably will be aggravated by the direct and indirect GHG emissions from the Navajo Mine—it was arbitrary and capricious for OSMRE to only briefly (and inadequately) mention the effects of climate change with regard to air pollution. Instead, as mentioned above, OSM should have considered how climate change is projected to impact water, soil, vegetation, wildlife, endangered and threatened species, the economy, and vulnerable populations, alone and in conjunction with the direct, indirect, and cumulative impacts of the proposed extension of the Navajo Mine. Without such a hard look, the EA will have failed to take a hard look at impacts and OSM cannot justify its Finding of No New Significant Impact. 40 C.F.R. §§ 1508.7, 1508.8, 1508.27(a), (b).

The EA's conclusion with respect to GHG emissions is arbitrary and capricious. While the EA does take the time to assess the social cost of carbon (SCC), the assessment is unreasonable and irrational. Inexplicably, the EA determines that the GHG emissions would be identical in all alternatives. EA at 346. This despite the fact that the EA repeatedly states that the no action alternative could lead to a reduction in mining and potential closure of the mine and power plant. The EA's ultimate conclusion that the climate impacts from the continued expansion of the mine would be "minor in the short- and long-term." EA at 347. This conclusion simply does not follow, given that the GHG emissions will cause, by a modest analysis, \$2.5 BILLION in damages. *See* EA at 346. By comparison, this is greater than all the direct and indirect value that the project is expected to generate over this period of time. *See* EA at 383. Further, the SCC has been repeatedly criticized as a significant underestimate of the actual harm caused by GHGs, as the Citizens Groups noted in our prior comments.<sup>6</sup> By this same measure, the EA's conclusion that no GHG mitigation is required on the basis that the \$2.5 billion in harm is not "a major contribution to adverse effects associated with climate change" is arbitrary and capricious. *See* EA at 348.

The conclusion of the EA (and FONNSI) that no significant impacts will result ignores the fact that San Juan County is expected to be in of non-attainment of National Ambient Air Quality Standards (NAAQS) throughout the coming years due principally to the emissions from SJGS and FCPP, which the Navajo Mine supplies, along with oil and gas operations. EA at 213. Because, the ozone standard has now been set at 70 ppb possibly placing San Juan County in non-attainment status. Health studies show that ozone is currently causing health impacts in San Juan County. Salvatore & Dee, Community Health Improvement Council, *San Juan Community Health Profile* 28 (Jan. 2010). This is particularly troubling because "San Juan County is the worst county in New Mexico for release of toxic materials to the environment, and is ranked in the top 10% of worst counties in the United States for toxic releases to the environment." *Id.* Also, "San Juan County is in the top 10% of the worst counties in the United States for PM-2.5

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<sup>6</sup> Letter from WELC, to Calle & Williamson, OSM (Feb. 18, 2005) (attached as Exhibit 1).

emissions, PM-10 emission, and sulfur dioxide emissions. Area power plants are the major contributor to these three pollutants.” *Id.* San Juan County suffers higher rates of chronic lower respiratory disease than the average rate in New Mexico or the United States more broadly. *Id.*

Moreover, the EA’s analysis of the significance of the impacts of air pollution is inadequate. It is an error of law for the EA to use Clean Air Act significance criteria to assess the magnitude of the very different significance determination required by NEPA. The EA relies repeatedly on supposed compliance with the outdated ozone NAAQS standard of 75 ppb to conclude that impacts from air pollution from FCPP will be insignificant. *See* EA at 111, 331, 390. However, contrary to the EA’s conclusions, the current NAAQS standard for ozone is 70 ppb.<sup>7</sup> Contribution to non-compliance with environmental standards is a significance factor under NEPA. 40 C.F.R. § 1508.27(b)(10).<sup>8</sup> OSM can hardly continue to blame the impacts of excessive ozone pollution on inadequately vented residential heating equipment. OSM must prepare an EIS to discuss at length the significant harmful impacts from excessive ozone exposure. Further, the scientific research on which the recent amendment of the ozone standard was based showed that, while the 70 ppb standard may be sufficient to protect health adults, it is not sufficient to protect vulnerable populations, such as the elderly, the young, and people with compromised respiratory systems. We discussed this issue at length in prior comments on OSM’s prior EIS. The EIS never addressed this issue. Those comments are attached and incorporated here in full by reference.<sup>9</sup> Further, as noted in the Citizens Groups prior comments, ozone levels in the Four Corners area have been increasing in recent years and often exceeding the 70 ppb ozone NAAQS threshold (these comments are, as mentioned, already in OSM’s possession, and are incorporated here by reference, including Exhibit 29, the report by Victoria Stamper<sup>10</sup>). OSM’s EA, however, excludes this information by only including stale ozone information from nearly a decade ago, 2008 to 2010. EA at 3.5-14.

Furthermore, the EA fails entirely to address the cumulative impacts of mercury pollution from the mine and FCPP (in addition to SJGS). This is troubling because “mercury is a pollutant that is of particular concern in the Four Corners region. Mercury is released into the

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<sup>7</sup> EPA, Regulatory Actions, Ozone Standards, <http://www3.epa.gov/ozonepollution/actions.html> (last visited Nov. 24, 2015) (“On October 1, 2015, EPA strengthened the National Ambient Air Quality Standards (NAAQS) for ground-level ozone to 70 parts per billion (ppb), based on extensive scientific evidence about ozone’s effects on public health and welfare.”).

<sup>8</sup> For this same reason, continued deposition of selenium from FCPP emissions will contribute to the existing selenium impairment of the San Juan River. EA at 288. This contribution to violation of environmental standards also evidences the significance of this project, warranting preparation of an EIS. 40 C.F.R. § 1508.27(b)(10).

<sup>9</sup> Letter from WELC, to Calle & Williamson, OSM (Feb. 18, 2005).

<sup>10</sup> Attached as Exhibit 2.

environment from coal-fired power plants and from mining. . . . Mercury is a heavy metal that builds up and remains in the ecosystem and can be found in toxic levels in fish in many areas in San Juan County. Even in small amounts, mercury can cause a variety of physiological problems, illness, and even death, according to Dr. Grossman, a Durango physician researching the effects of mercury on pregnant women and their newborn infants.” *Id.* Despite the fact that many waterways in the Four Corners region are contaminated by mercury and include impacts of mercury from burned coal at FCPP via Navajo Mine, the Revised EA for Navajo Mine Area IV North Permit Revision Application ignores the serious problem of mercury. The EA does not discuss the Navajo Mine’s indirect impact of mercury emissions to water resources. As mentioned above, mercury is released into the environment from coal mines and coal fired power plants and is found in toxic levels in fish in many areas of San Juan County. Nevertheless, the EA fails to discuss the cumulative impacts of mercury pollution that is caused directly or indirectly by the Navajo Mine. Given the history of the Navajo Mine series of EAs, it is alarming that OSMRE continues to turn a blind eye to mercury impacts in the Revised EA for Navajo Mine Area IV North Permit Revision Application.

Additionally, the EA does not address the environmental impacts of long-range air pollutants emitted when FCPP burns the coal mined from Area IV North. *See* Charles J. Cichetti, *Expensive Neighbors: The Hidden Costs of Harmful Pollution to Downwind Employers and Businesses* 38 (Dec. 2010) (“Power plants without pollution controls can no longer be permitted to use the air stream as a free waste transfer system that pollutes the air for downwind populations, not only causing many thousands of premature deaths and illnesses each year, but also causing higher labor and health insurance costs, lost jobs, lost state and local tax revenues and higher gasoline prices in downwind regions.”).

The EA fails to disclose radiation impacts from burning coal (the coal includes inter-bedded uranium) at FCPP derived from Navajo Mine. Radiation is associated with air emissions and in the vast amounts of coal combustion waste (CCW) now stored at FCPP on the banks of the Chaco River. BHP and NTEC are responsible for the CCW and the radiation impacts to humans where CCW could leach into the Chaco River to the San Juan River to the Colorado River. OSMRE’s failure to mention radiation and associated uranium in coal at Navajo Mine is egregious.

Cottonwood Wash in Area IV North requires an Individual Permit under the Clean Water Act through the U.S. Army Corps of Engineers (USCOE). This permit is part of the Proposed Action in the revised EA, although an Individual Permit requires an EIS, public meetings and a Federal Register notice. The Individual Permit for the 404 permit is not sufficiently covered in OSMRE’s revised EA for Navajo Mine. USCOE cannot proceed without an EIS and OSMRE must revise the revised Navajo Mine EA to disclose to the public this malfeasance.

The EA's assessment of socio-economic impacts is also incomplete. While the EA sings the praises of the massive strip mine and hugely polluting power plant, it fails entirely to discuss the well known and documented harms (the "curse of natural resources") that result from such heavy reliance on development of natural resources.<sup>11</sup> Heavy natural resource development is known to crowd out other industries, such as manufacturing and tourism; on the other hand, protected natural amenities are driving modern high tech job growth.<sup>12</sup> Currently, the Navajo Nation is trying to develop additional economic drivers for a diversified economy that is less dependent on coal. EA at 391. The EA must assess the degree to which the existence of the heavily polluting strip mines and power plants, like the Navajo Mine-FCPP complex, impairs the Navajo Nation's ability to develop a diverse economic base.

Finally, the EA fails entirely to assess the proposed mine expansion's impacts on traditional Navajo cemeteries. The Surface Mining Control and Reclamation Act prohibits coal mining within 100 feet of any cemetery. 30 C.F.R. § 761.11(g). Cemetery is defined broadly to include any area of land where human bodies are interred. *Id.* § 761.5. The EA admits that there are 10 human burials in Area IV North and additional one historic Navajo burial in Area III. EA at 257, 259. As such, there are cemeteries in within Area IV North and mining may not occur within 100 feet of these cemeteries. The EA makes no effort to delineate the bounds of these cemeteries (a cemetery is larger than simply the location of individual interred bodies) and gives no indication that OSM is going to prohibit NTEC from mining near each of these burials. The existence of these cemeteries constitute yet another NEPA significance factors, warranting preparation of an EIS. 40 C.F.R. § 1508.27(b)(3). OSM's failure to recognize the protected status of these cemeteries seems to indicate that OSM does not intend to extend SMCRA's protections to them. Please clarify in OSM's further review of this project that these cemeteries are entitled and will be afforded the protections of SMCRA.

## **5. The Revised EA arbitrarily claims compliance with the Endangered Species Act**

The Endangered Species Act (ESA) implements a Congressional policy that "all Federal Departments and agencies shall seek to conserve endangered species and threatened species." 16 U.S.C. § 1531(c)(1). An "endangered species" is a species of plant or animal that is "in danger of extinction throughout all or a significant portion of its range," while a "threatened species" is one which is likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(6), (20). The operative core of the ESA is a list maintained by the Secretary of the Interior of

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<sup>11</sup> Sachs & Warner, The Curse of Natural Resources 45 European Economic Rev. 827 (2001) (attached as Exhibit 3); Sachs & Warner, Natural Resource Abundance and Economic Growth, Working Paper 5398, National Bureau of Economic Growth (1995) (attached as Exhibit 4).

<sup>12</sup> Jeff Goodell, Big Coal at 32-33 (2006); Headwaters Economics, Montana's Economy and the Role of Federal Protected Lands (2011) (attached as Exhibit 5)

threatened and endangered species, and the ESA permits citizens to petition the Secretary to add species to that list. 16 U.S.C. § 1533(b)(3)(A).

At the heart of Congress's plan to preserve endangered and threatened species is Section 7 of the ESA, which places affirmative obligations upon federal agencies. Section 7(a)(1) provides that all federal agencies "shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1).

The mandate of section 7(a)(2) is even clearer:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical, unless such agency has been granted an exemption for such action . . . pursuant to subsection (h) of this section.

*Id.* § 1536(a)(2). Thus, section 7(a)(2) imposes two obligations upon federal agencies. The first is *procedural* and requires that agencies consult with the FWS to determine the effects of their actions on endangered or threatened species and their critical habitat. *See Id.* § 1536(b). The second is *substantive* and requires that agencies insure that their actions not jeopardize endangered or threatened species or their critical habitat. *See Id.* § 1536(a)(2); *see also, Florida Key Deer v. Paulison*, 522 F.3d 1133, 1138 (11th Cir. 2008).

The requirements of the ESA are triggered by "any 'agency action' which may be likely to jeopardize the continued existence of the species or its habitat." 16 U.S.C. § 1536(a). By this process, each federal agency must review its "actions" at "the earliest possible time" to determine whether any action "may affect" listed species or critical habitat in the "action area." 50 CFR § 402.14; 50 CFR § 402.02. When there exists a chance that such species "may be present," the agency must conduct a biological assessment (BA) to determine whether or not the species "may be affected" by the action. *See* 16 U.S.C. § 1536(c). The term "may affect" is broadly construed by FWS to include "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character," and is thus easily triggered. 51 Fed. Reg. at 19926. If a "may affect" determination is made, "formal consultation" is required and a biological opinion (BiOp) must be prepared.

Numerous threatened and endangered species are known to occur within the federally defined "action area" of the Navajo Mine and the proposed expansion area, all of which "may" be affected directly, indirectly, and/or cumulatively by the proposed action and its resulting coal



mining and transportation, as well as by subsequent combustion at Four Corners Power Plant. Listed species and critical habitats that may be affected include: the endangered Colorado pikeminnow (*Ptychocheilus lucius*) and its designated critical habitat; the endangered razorback sucker (*Xyrauchen texanus*) and its designated critical habitat; the endangered roundtail chub (*Gila robusta*); the endangered southwestern willow flycatcher (*Empidonax traillii extimus*) and its designated critical habitat; the endangered yellow-billed cuckoo (*Coccyzus americanus*); the threatened Mesa Verde cactus (*Sclerocactus mesae-verdae*); the endangered Mancos milkvetch (*Astragalus humillimus*); the endangered Rio Grande silvery minnow (*Hybognathus amarus*) and its designated critical habitat; and, the endangered California condor (*Gymnogyps californianus*) (collectively referred to herein as “Listed Species and Critical Habitats”). See U.S. Dep’t of the Interior, U.S. Fish and Wildlife Service, *Draft Biological Opinion for the Desert Rock Energy Project, U.S. Bureau of Indian Affairs, Gallup, New Mexico* (Oct. 2009) (Desert Rock BiOp) see also 50 CFR § 402.02 (defining “indirect effects” as “those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.”).

The Navajo Mine EA cites to the Biological Opinion for the FCPP/NMEP Project (2015 BiOp) and also claims consultation with United States Fish and Wildlife Service in 2011. Neither of these processes is appropriate for the Navajo Mine Area IV expansion given the recognition that the impacts of the Proposed Action will now extend to 2019-2020. Further, the 2015 BiOp is arbitrary and capricious and consequently any reliance on the 2015 BiOp is misplaced.

The Revised EA fails to take a hard look at mercury pollution from the disposal of coal combustion waste (CCW) at the Navajo Mine, as well as the combustion of coal from the Navajo Mine at FCPP—both of which will indirectly and cumulatively impact endangered Colorado pikeminnow, the razorback sucker and their critical habitat. Both fish would be exposed to mercury emissions through surface and groundwater contamination and ambient air exposure, deposition, and runoff into aquatic habitats, and subsequent bioaccumulation through the food chain. See Desert Rock BiOp at 120. Upon entering the San Juan River ecosystem, microorganisms convert mercury to methylmercury, a highly toxic form of mercury. *Id.* Because methylmercury is stable and accumulates through the food chain, the highest mercury concentrations are found in top predators, such as the Colorado pikeminnow, causing reproductive impairment, behavioral changes, and brain damage. *Id.* Using a threshold for adverse effects of 0.2 mg/kg WW, 64 percent of Colorado pikeminnow experience reproductive impairment due to mercury presently. *Id.* By 2020, the Desert Rock BiOp finds that mercury deposition in the San Juan River basin is expected to increase by 35.4 percent without or 35.5 percent with the construction of the proposed Desert Rock Energy Project. *Id.* at 3. For this reason, FWS’s draft biological opinion predicts that 72 percent of Colorado pikeminnow in the San Juan River basin will experience mercury-induced reproductive impairment by 2020—which “is likely to *jeopardize* the continued existence of the Colorado pikeminnow.” *Id.* at 120 (emphasis added). The Desert Rock BiOp and jeopardy opinion is based on a conservative

estimate of environmental release and exposure to mercury. Among other things, the Desert Rock BiOp does not evaluate or consider the significant contribution of mercury from forty-years of CCW disposal at the Navajo Mine. According to EPA's TRI, which provides BHP reported data from 2000-2007, thousands of pounds of mercury have been disposed of in the Navajo Mine annually as "minefill." None of the CCW is treated prior to disposal and BHP does not use a liner system or any other control mechanism to prevent saturation and migration of the mercury or other constituents into surface or ground waters which flow directly into the San Juan River.

Moreover, OSM has failed to consider the impacts that climate change will have on listed species. According to experts at the GAO, federal land and water resources are vulnerable to a wide range of effects from climate change, some of which are already occurring. These effects include, among others, "(1) physical effects, such as droughts, floods, glacial melting, and sea level rise; (2) biological effects, such as increases in insect and disease infestations, shifts in species distribution, and changes in the timing of natural events; and (3) economic and social effects, such as adverse impacts on tourism, infrastructure, fishing, and other resource uses."<sup>13</sup> There is a growing consensus within the scientific community that climate change will "compound existing threats to declining species and lead to an acceleration of the rate at which biodiversity is lost. The species that are most vulnerable to extinction from whatever cause are those with restricted ranges, fragmented distribution within their range, low populations, reducing range, decreasing habitat within the range, and/or which are suffering population declines. Species with quite restrictive habitat requirements are most vulnerable to extinction. Where climate change is projected to reduce habitats of such species there are likely to be the greatest extinction risks."<sup>14</sup> Not surprisingly, "[a]quatic and wetland ecosystems display high vulnerability to climate change. Changes in water temperature and shifts in timing of runoff will change aquatic habitats, resulting in species loss or migration as well as novel and unpredictable interactions of new combinations of species."<sup>15</sup>

Impacts from climate change are anticipated to acutely affect New Mexico, and include

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<sup>13</sup> GAO Report, *Climate Change: Agencies Should Develop Guidance for Addressing the Effects on Federal Land and Water Resources* (2007); see also Committee on Environment and Natural Resources, National Science and Technology Council, *Scientific Assessment of the Effects of Global Climate Change on the United States* (2008); Melanie Lenart, et al., *Global Warming in the Southwest: Projections, Observations and Impacts* (2007) (describing impacts from temperature rise, drought, floods and impacts to water supply on the Southwest).

<sup>14</sup> Agency Technical Work Group, State of New Mexico, *Potential Effects of Climate Change on New Mexico* (2005), at 24-25.

<sup>15</sup> John R. D'Antonio, *The Impact of Climate Change on New Mexico's Water Supply and Ability to Manage Water Resources* (2006), at 45.

the “dewatering of rivers and streams,” as well as “[i]ncreased drying of soils and significant reductions in soil moisture”—all of which are “likely with climate change as potential evapotranspiration rises with increasing temperatures.”<sup>16</sup> These effects will “compound the adverse effects of changes in the hydrology of runoff and water availability throughout New Mexico.”<sup>17</sup> Water availability has the potential to significantly impact endangered and threatened species. For example, “[s]ubstantial changes in the natural hydrograph and intensification of managed uses will severely disrupt stream ecology and health, which may have additional implications for managing endangered [fish species],”<sup>18</sup> as well as those species—like the Southwestern willow flycatcher—which “rely on riparian vegetation for nesting and food resources.”<sup>19</sup> None of these impacts to listed species from climate change were considered in OSM’s BE, a fatal error.

Furthermore, OSM failed to consult with FWS in 2011—in violation of the ESA and its implementing regulations.<sup>20</sup> In correspondence with OSM, SJCA specifically requested a copy of initial consultations with FWS on compliance of the proposed project with the Endangered Species Act, to which OSM’s response was that “OSM has nothing to provide.”<sup>21</sup> Indeed, the BE states that there was no consultation with FWS because OSM had “consulted in the past.” Appendix E at 1. Unfortunately for OSM, past outdated consultations do not satisfy the ESA’s implementing regulations. As noted above, the only listed species contemplated in the EA was the Southwestern willow flycatcher—which OSM concluded may be affected but is unlikely to adversely affected by the proposed project. EA at 181. However, once a “may affect” determination is made, the Federal agency must either request FWS concurrence with a “may affect, but not likely to adversely affect” finding, or request initiation of formal consultation. 50

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<sup>16</sup> Brian H. Hurd, et al., *Climate Change and Its Implications for New Mexico’s Water Resources and Economic Opportunities* (2007), at 18.

<sup>17</sup> *Id.*

<sup>18</sup> Hurd, et al. at 19.

<sup>19</sup> See Agency Technical Work Group, State of New Mexico, at 25, 26.

<sup>20</sup> According to the ESA Section 7 Handbook, at 4-12, “[t]he history of the consultation request includes any informal consultation, prior formal consultations on the action, documentation of the date consultation was initiated, a chronology of subsequent requests for additional data, extensions, and other applicable past or current actions. Conclusions reached in earlier informal and formal consultations on the proposed action also may be relevant. If so, such conclusions should be documented in the biological opinion.”

<sup>21</sup> Email from Bob Postle, Manager, Program Support Division, Western Region, OSM to Mike Eisenfeld, New Mexico Energy Coordinator, SJCA April 12, 2011.

C.F.R. § 402.14(a).<sup>22</sup> In other words, a determination of “not likely to adversely affect” (a conclusion reached at the end of a BA) requires the consent of the FWS. Here, that consent was neither sought nor granted.

Aside from the evident concerns that OSM’s dismissive approach to ESA compliance raises for the many listed species at risk from the proposed action, there are also concerns with regard to the public’s opportunity to evaluate this action. In *Wildlands v. U.S. Forest Service*, 791 F.Supp.2d 979, 991 (D. Or. 2011), the court concluded that “the public evaluation process of the proposed agency action and its impact on the environment was skewed by the inaccurate and misleading ‘not likely to adversely impact’ [listed species] determination in the EA.” The court continued, “[T]he public is entitled to be accurately informed of the impact of the proposed action . . . and to have a meaningful opportunity to weigh in on the proposal during the period for public review and comment.” *Id.* OSM’s approach has foreclosed the public this opportunity through its cursory and insulated analysis.

Thus, the direct, indirect and cumulative impacts to threatened and endangered species and their critical habitats must be analyzed as a result of the proposed Navajo Mine Area IV North Mine Plan Revision, per compliance requirements with Section 7 of the ESA, 16 USC § 1536, and its implementing regulations at 50 CFR § 402. Those impacts include but are not limited to the impacts of mercury and selenium pollution resulting from coal mining, combustion, waste disposal and climate change on all the listed species and critical habitat in question. In addition, the Navajo Nation Fish and Wildlife Department must be consulted on any potential action concerning the Navajo Nation and potential impacts to species listed under the Navajo Endangered Species List (NESL).<sup>23</sup>

In any event, the adverse impacts of the project on Colorado pikeminnow and Razorback sucker are sufficient to require preparation of an EIS. 40 C.F.R. § 1508.27(b)(9). As an initial matter, the BA itself says that the operations of the APS Weir (the continued operations of which are reasonably foreseeable if mining activities are continued in Area IV North) will likely adversely affect Colorado pikeminnow and Razorback sucker by impeding migration. EA at 376. Further, despite mitigation efforts, it is clear that continued operations of the Navajo Mine and FCPP will continue to adversely affect Colorado pikeminnow and Razorback sucker. As the 2015 BiOp, on which the EA relies, notes:

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<sup>22</sup> See also U.S. Fish and Wildlife Service, *Section 7 Consultation, Guidance for Preparing a Biological Assessment* (2011), available at: [http://www.fws.gov/midwest/endangered/section7/ba\\_guide.html](http://www.fws.gov/midwest/endangered/section7/ba_guide.html) (last visited Jan. 5, 2012).

<sup>23</sup> The Navajo Mine EA predicts impacts from habitat loss and modification, as well as disturbance from mine related noise and human presence to the following Navajo Nation listed species: kit fox, golden eagle, ferruginous hawk, western burrowing owl, and San Juan milkweed. See EA, at 181-82.

Past and present activities within the San Juan River basin have degraded these habitat elements [primary constituent elements] to the extent that their co-occurrence at the appropriate places and times is insufficient to support successful Colorado pikeminnow and razorback sucker recruitment at levels that will provide for the species' conservation. While implementation of the proposed action is expected to exacerbate the very limited co-occurrence of PCEs at appropriate places and times, the implementation of the Conservation Measures will offset that impact. The increased Hg deposition in the basin, the contamination of the physical properties of the water, and the prey of Colorado pikeminnow could lead to an irreversible loss of reproductive success and adult survival necessary to sustain the species beyond the proposed action. As previously noted, **these effects are attributable to the degraded environmental baseline, the proposed action and future predicted increased global contributions of Hg to the basin.**<sup>24</sup>

Because the proposed action is clearly going to contribute to adverse impacts to endangered species (in addition to other reasons), it must prepare an EIS.

#### **6. The EA fails to evaluate bonding/liabilities at Navajo Mine**

Despite the departure of BHP Billiton by 2016 as owner/manager at Navajo Mine, the Revised EA for the proposed Navajo Mine Area IV North Mine Plan ignores bonding at Navajo Mine, now the responsibility of NTEC/Navajo Nation. OSMRE has failed to disclose due diligence reports discussing future economic impacts that will be incurred for reclamation and all liabilities associated with Navajo Mine. This is important because BHP currently has insufficient bonds to reclaim Navajo Mine, while passing on responsibilities via waivers for liability to Navajo Nation. Following BHP and Utah International mining for over 50 years at Navajo Mine, will OSMRE allow BHP to simply walk away leaving NTEC/Navajo Nation to grapple with the enormous financial costs of reclaiming Navajo Mine? BHP has recently been responsible for the Samarco iron-ore dam breach in Brazil, exposing huge financial liabilities with the released pollution and significant adverse impacts to humans. OSMRE has failed to disclose bonding/liabilities/waivers at Navajo Mine in this revised EA that could adversely impact Navajo Nation taking over the Navajo Mine on their own in 2016. In addition, OSMRE has an obligation to insure that the public does not end up having to pay for BHP's liabilities at Navajo Mine. Sadly, this follows the sordid old storybook in the Four Corners Region (see Animas River Spill in August of 2015) where industries are allowed to mine and are then nowhere to be found (or bankrupt) when the true costs and impacts come to bear. In fact, the San Juan River is an imperiled river, threatened by Navajo Mine impacts including mercury and a legacy of pollution. Despite BHP publicly stating that they are responsible for insuring the future of Navajo Mine and FCPP, the real story is that they are evading the enormous financial

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<sup>24</sup> 2015 BiOp at 136.

cost of cleanup at Navajo Mine as they exit. The revised EA is the appropriate level of analysis for OSMRE to confront this BHP departure issue.

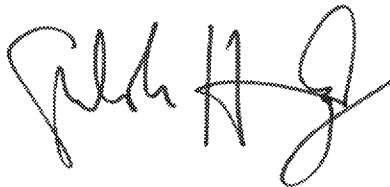
In conclusion, the Proposed Action in this EA is no longer associated with a deadline of 2016 for exhausting Navajo Mine coal resources in Area IV North—this now extends to 2019-2020. OSMRE must disclose all bonding/liabilities/due diligence associated with Navajo Mine Area IV North, as well to the entire Navajo Mine complex.

### **Conclusion**

The Citizens Groups appreciate the opportunity to discuss the continuing harmful impacts of the Navajo Mine and Four Corners Power Plant. While OSM has improved its analysis, the Citizens Groups believe that the analysis remains inadequate. It seems apparent that the mine power-plant complex cannot continue to operate without special dispensations from regulated authorities. OSM must take a hard look at this ongoing operation. The result of such a hard look, the Citizens Groups believe, can only lead to one conclusion: that the federal agencies must oversee a near term transition and closure of the complex.

If you have any questions about these comments, please don't hesitate to contact me.

Sincerely,



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